



## **Potential Challenges to a President’s Attempt to Deploy Law Enforcement to the Polls on or Around Election Day** **August 2020**

During an interview on Fox News on August 20, 2020, President Trump threatened to send law enforcement to the polls on Election Day to prevent purported voter fraud, stating: “We’re gonna have everything. We’re gonna have sheriffs and we’re gonna have law enforcement and we’re going to have hopefully U.S. Attorneys . . . .”

If President Trump, his campaign, or other actors were actually to follow through on this threat, they would violate federal law and threaten a free and fair election. As described below, several legal authorities might be relevant to any attempt to deploy state, local, or federal law enforcement to polling places.

### **The President Has No Authority Over State and Local Law Enforcement**

As a preliminary matter, under the Tenth Amendment and principles of federalism, the president has no authority over state and local law enforcement, including sheriffs. He cannot order them to the polls or anywhere else.

Moreover, federal law prohibits state and local employees operating “in connection with any activity which is financed in whole or in part by loans or grants made by the United States” from using their official authority for the purpose of “interfering with or affecting” a presidential or congressional election. The punishment is a fine or up to a year in prison, or both. *See* 18 U.S.C. § 595.

Finally, a number of states have their own laws prohibiting law enforcement either from entering a polling place unless called there by election officials, or from interfering with an election. *See, e.g.*, California Elec. Code § 18544; Georgia Code Ann. § 21-2-593; Minnesota Stat. Ann. § 204C.06, Subd. 6; New Mexico Stat. Ann. § 1-12-5; South Carolina Code Ann. § 7-13-160; Tennessee Code Ann. § 2-7-103.

### **Federal Laws Specifically Prohibit Election Interference by Federal Officials**

Several provisions of federal law prohibit (and punish) election interference by federal employees, federal law enforcement, and the military.

**18 U.S.C. § 592**—Prohibits both military and armed federal law enforcement from being present at the polls. Specifically, the statute prohibits officers in the military “or other person in

the civil, military, or naval service of the United States” from bringing or keeping “any troops or armed men at any place where a general or special election is held, unless such force be necessary to repel armed enemies of the United States.” The punishment is a fine or up to five years in prison, or both, as well as disqualification from holding federal office.

**18 U.S.C. § 593**—Prohibits members of the military from interfering in the election, including by intimidating voters or interfering with election officials. Specifically, the statute prohibits “an officer or member of the Armed Forces” from preventing or attempting to prevent “by force, threat, intimidation, advice or otherwise” any qualified voter from fully exercising his or her rights at any general or special election. It also prohibits members of the military from attempting to “prescribe or fix” in any way the qualifications of voters at any election in any state, or from interfering with “an election officer’s discharge of his duties.” The punishment is a fine or up to five years in prison, or both, as well as disqualification from holding federal office.

**18 U.S.C. § 595**—Prohibits federal employees from using their official authority to interfere with the election. Specifically, the statute prohibits any “person employed in any administrative position by the United States, or by any department or agency thereof” from using their official authority for the purpose of “interfering with or affecting” a presidential or congressional election. The punishment is a fine or up to a year in prison, or both.

### **Law Enforcement Activity at the Polls May Violate Voter Intimidation Laws**

Sections 11(b) of the Voting Rights Act and 131(b) of the Civil Rights Act of 1957, codified at **52 U.S.C. § 10307(b) and § 10101(b)**, broadly prohibit all forms of voter intimidation by private *and government* actors, including law enforcement. In fact, courts have long recognized that the presence of law enforcement officials or poll watchers wearing official-seeming clothing in polling places for ballot security operations can illegally intimidate voters. *See, e.g., Democratic Nat’l Committee v. Republican Nat’l Committee*, 671 F. Supp. 2d 575, 579-80, 610-613 (D.N.J. 2009).<sup>1</sup>

The Ku Klux Klan Act, **42 U.S.C. § 1985(3)** (clause 3), also prohibits conspiracies to “prevent by force, intimidation, or threat” any lawful voter from supporting or advocating for any candidate in a presidential or congressional election. To the extent that the federal government—or the Trump campaign—works in concert with state or local law enforcement to intimidate voters, it likely would violate this statute and be subject to civil legal liability.

Finally, a federal criminal statute, **18 U.S.C. § 594**, also prohibits voter intimidation by any person in connection with a presidential or congressional election. The punishment is a fine or up to a year in prison, or both.

<sup>1</sup> *See also, e.g., United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967) (local sheriff’s department engaged in a series of actions that, together, constituted a pattern of voter intimidation); *United States v. Wood*, 295 F.2d 772, 781-82 (5th Cir. 1961) (law enforcement activity against voting rights organizer violates § 131(b)); *United States v. Clark*, 249 F. Supp. 720, 728 (S.D. Ala. 1965) (law enforcement activity against Black voters and voting rights organizers violates § 131(b)).

## **Election Interference by Law Enforcement May Violate the Constitution**

A decision by the president to order law enforcement to the polls may also violate the First, Fifth, and Fourteenth Amendments.

The Fifth Amendment requires that elections be fundamentally fair and that government officials not use their official powers over the electoral process to influence the outcome in a self-interested fashion. As a result, any decision by President Trump to utilize his official powers to enlist federal or state law enforcement to intimidate voters or otherwise manipulate the outcome would violate eligible voters' right to vote in a fundamentally fair election. *See, e.g., League of Women Voters of Florida v. Scott*, 366 F. Supp. 3d 1311, 1317 (N.D. Fl. 2018) (observing that if an executive “ordered [law enforcement] to investigate” alleged voter fraud, “then a . . . case could be made for unconstitutional intimidation”); *Joyner v. Browning*, 30 F. Supp. 512, 514 (W.D. Tenn. 1939) (finding it unconstitutional for the governor to use “State troops to carry out his boast of stopping the voting by local voters in Shelby County and to terrorize them”).

The First, Fifth, and Fourteenth Amendments also require federal and state officials to use their law enforcement powers in a non-partisan, non-arbitrary fashion, and prohibit the vindictive use of those powers against political opponents or in retaliation for constitutionally protected activities such as political speech, association, and voting. “[T]he power of government” cannot be “brought to bear . . . merely because a powerful . . . official harbors a malignant animosity.” *Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995). As a result, if President Trump’s “motivation” for using law enforcement “was an unconstitutional one—e.g., if the reason for [doing so] was to chill the exercise of” constitutional rights, that too would violate the Constitution. *United States v. Vazquez*, 145 F. 3d 74, 82 n.5 (2d Cir. 1998); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (otherwise lawful acts done for an unlawful motive are unconstitutional).